

Filed 1/22/01

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALAN N. RADEMAN,  
Petitioner,

v.

THE SUPERIOR COURT OF LOS  
ANGELES COUNTY,  
Respondent;

RON JOSEPH et al.,  
Real Parties in Interest.

No. B143617  
(Super. Ct. No. BS063216)

ORIGINAL PROCEEDING: Application for writ of mandate; writ issued.  
Emily Elias, Commissioner.

Lewin & Levin, Mark A. Levin, Henry Lewin, Debra L. Grossman;  
Greines, Martin, Stein & Richland, Marc J. Poster and Barbara Springer Perry for  
Petitioner.

Law Offices of Daniel H. Willick and Daniel H. Willick, for California  
Psychiatric Association as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

Bill Lockyer, Attorney General, Carlos Ramirez, Senior Assistant Attorney  
General, Adrian K. Panton, Supervising Deputy Attorney General and Karen B.  
Chappelle, Deputy Attorney General, for Real Parties in Interest.

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A pharmacist filed a complaint with the medical board claiming a psychotherapist had been prescribing unusually large quantities of drugs and controlled substances to certain of his patients. The board began investigating the psychotherapist for possible illegal acts and issued a subpoena duces tecum for the questioned patient files. The psychotherapist resisted the subpoena, asserting his patients' privacy interests and psychotherapist-patient privilege. The board sought and obtained a court order directing the psychotherapist to release the patient files to the board. The psychotherapist seeks a writ of mandate to vacate the trial court's order. We hold to the extent the crime/tort exception applies, the psychotherapist-patient privilege is unavailable and any information in those patient files within the exception may be made available to the board for its investigation. Accordingly, we grant the writ to vacate the trial court's order releasing the files in their entirety to the board, and direct the court to conduct an in camera review of the files to determine the applicability of the crime exception as it may be applied in this case.

#### FACTS AND PROCEEDINGS BELOW

Ms. Joanna Lalich is a licensed pharmacist employed by Walgreen's (store #4052). According to Ms. Lalich's declaration, on November 4, 1998, she received a prescription written by petitioner Dr. Alan N. Rademan for patient W.N. It authorized W.N. to receive Tylenol with Codeine number four and Vicodin ES (750 mg.) both for quantities of 250 pills, to be taken every four hours. W.N. admitted to Ms. Lalich he was a drug addict.

On learning this information Ms. Lalich called Dr. Rademan and asked him whether the prescription written for W.N. was legitimate. When Dr. Rademan stated it was, Ms. Lalich informed him the patient had admitted to being a drug

addict. According to Ms. Lalich, Dr. Rademan directed her to give W.N. what he wanted. Ms. Lalich refused to fill the prescription.

In her declaration, Ms. Lalich also stated another of Dr. Rademan's patients, D.B., "repeatedly visits the pharmacy, requesting controlled medication for migraines, and Dr. Rademan automatically refills whatever patient D.B. requests."

On November 5, 1998, Ms. Lalich filed a complaint against Dr. Rademan with the Medical Board of California, Department of Consumer Affairs (Board).

In December 1999 the Board began its investigation of the charges against Dr. Rademan. An investigator for the Board interviewed several Walgreen's pharmacists. Pharmacist Lalich reaffirmed her earlier accusations. In his declaration, Pharmacist Paul Harris stated every few weeks patient W.N. visited the pharmacy and "had prescriptions filled for an unusually large amount of medicine." Pharmacist Harris stated most of these prescriptions were written by Dr. Rademan, but patient W.N. also had other doctors who sometimes prescribed him the same substances. Pharmacist Harris noted patient W.N. had been prescribed these medicines for a long period of time and the pharmacist found it unusual the amount of medicines prescribed had not decreased over time.

He contacted Dr. Rademan to express his concerns. Dr. Rademan informed the pharmacist to keep filling the prescriptions "because patient W.N. was a former heroin user who was 'detoxifying.'" Although Dr. Rademan stated he would be decreasing the amount of medicine prescribed patient W.N. in the future, pharmacist Harris noted the prescriptions did not decrease, and as a result, the pharmacy refused to continue to fill Dr. Rademan's prescriptions for patient W.N.

The Board investigator interviewed Robin Gardner, a licensed pharmacist also employed by Walgreen's. According to her declaration, she noticed patient

D.B. visited the pharmacy frequently and had “prescriptions filled for a lot of medicines.” The pharmacist stated most of patient D.B.’s prescriptions were written by Dr. Rademan, but patient D.B. “also had other doctors who prescribed her the same medicine, but not as frequently.” When pharmacist Gardner informed Dr. Rademan other doctors were prescribing patient D.B. the same medications Dr. Rademan told her to continue filling patient D.B.’s prescriptions.

The Board investigator conducted an audit of Walgreen’s Pharmacy (store #4052) and obtained the original prescriptions written by Dr. Rademan for patients W.N. and D.B. The audit of this pharmacy revealed Dr. Rademan wrote prescriptions for patient D.B. as follows:

11-14-97	50 Hydrocodone, 7.5 mg. tablets
11-21-97	50 Hydrocodone, 7.5 mg. tablets
1-19-98	50 Hydrocodone, 10 mg. tablets
3-25-98	30 Alprazolam, 2 mg. tablets
3-31-98	50 Hydrocodone, 5 mg. tablets
4-8-98	60 Hydrocodone, 10 mg. tablets
4-29-98	50 Alprazolam, 2 mg. tablets and 50 Temazepam, 30 mg. tablets
5-26-98	50 Alprazolam, 2 mg. tablets
6-15-98	60 Hydrocodone, 10 mg. tablets
11-20-98	25 Clonazepam, 2 mg. tablets
11-30-09	60 Hydrocodone, 10 mg. tablets
12-8-98	60 Hydrocodone, 30 mg. tablets
12-14-98	60 Temazepam, 10 mg. tablets
1-14-99	60 Hydrocodone, 10 mg. tablets
9-26-99	50 Alprazolam, 2 mg. tablets

This pharmacy also had records of prescriptions Dr. Rademan had written for patient W.N.:

6-1-98            42 Klonopin, 2 mg. tablets

3-1-99            150 Acetaminophen with Codeine tablets

The investigator for the Board also conducted an audit of another Walgreen's Pharmacy (store #4239). The audit revealed Dr. Rademan wrote prescriptions for patient W.N. as follows:

5-28-98            50 Klonopin, 2 mg. tablets

5-29-98            58 Klonopin, 2 mg. tablets and 100 Carisoprodol, 350 mg.  
tablets 6-11-98            100 Klonopin, 2 mg. tablets and 100 Carisoprodol, 350 mg.  
tablets

6-18-98            150 Diazepam, 10 mg. tablets

6-19-98            100 Carisoprodol, 350 mg. tablets

7-24-98            200 Diazepam, 10 mg. tablets

8-16-98            100 Carisoprodol, 350 mg. tablets

10-29-98            200 Carisoprodol, 350 mg. tablets and 200 Diazepam, 10 mg.  
tablets

11-25-98            200 Carisoprodol, 350 mg. tablets and 200 Diazepam, 10 mg.  
tablets

2-22-99            150 Acetaminophen with Codeine tablets

3-10-99            100 Klonopin, 2 mg. tablets

Dr. Erich W. Pollak, the district medical consultant of the enforcement unit of the Board, reviewed the results of the Board's preliminary investigation, including the investigative report, the complaint letter from pharmacist Lalich, the patient profiles which Ms. Lalich supplied, and the Walgreen's stores' prescription records for these patients. Dr. Pollak noted Acetaminophen with Codeine, Diazepam, Lortab-S, Hydrocodone, Alprazolam and Temazepam are all controlled

substances. Based on this material, the doctor opined there was good cause to believe Dr. Rademan had violated the Medical Practice Act by prescribing without good medical reason, by excessively prescribing, by prescribing to an addict, and by treating migraine headache in violation of the Intractable Pain Treatment Act. To determine whether any of these violations actually occurred, Dr. Pollak stated it would be necessary to review these patients' medical records to determine whether and why prescribing these substances was medically indicated.

Both patients refused to consent to release of their records. Dr. Rademan asserted the psychotherapist-patient privilege and refused to comply with the Board's investigative subpoena duces tecum for the patients' medical records.

The Board filed a petition to enforce its investigational subpoena. The Board claimed it had a right to review the records as part of its disciplinary and enforcement responsibilities authorized under Business and Professions Code section 2200 et seq. In addition, the Board argued Business and Professions Code section 2225 makes the physician-patient privilege inapplicable to the Board's investigative activities in any event.

Dr. Rademan filed an opposition to the petition. Dr. Rademan supplied a declaration in response to the pharmacists' declarations stating: (1) although he did not specifically recall the conversation, he does not write prescriptions "on request" but only after an appropriate evaluation of the patient's psychiatric/medical condition; (2) although he has no specific recollection, it would not be his manner to tell a pharmacist patient W.N. was a detoxifying former heroin user; and (3) no pharmacist ever informed him patient D.B. was receiving prescriptions from other doctors for the same medications he was prescribing.

At the initial hearing on the motion, the trial court noted perhaps everything in the patients' medical records was unnecessary to the investigation and

suggested records redacting sensitive and irrelevant material would be sufficient. Counsel for the Board confirmed it was only interested in information bearing on diagnosis and the purpose for prescribing these medicines.

The Board claimed it was entitled to these records under the authority of Business and Professions Code section 2225. This section provides: “Notwithstanding . . . any other provision of law making a communication between a physician and surgeon or a podiatrist and his or her patients a privileged communication, those provisions shall not apply to investigations or proceedings conducted” by the Board.

Dr. Rademan pointed out Business and Professions Code section 2225 was inapplicable because the statute by its terms only applies to physicians, surgeons and podiatrists. He thus argued, because the Legislature did not expressly include psychotherapists in this particular exception to privileged communications, then the psychotherapist-patient privilege still applies and he was neither required nor permitted to divulge his patients’ files without their permission.

Thereafter, Dr. Rademan lodged sealed redacted and unredacted copies of patients W.N.’s and D.B.’s medical records. The record is unclear whether the trial court reviewed either version of the patients’ records. In any event, at the resumed hearing, the trial court granted the Board’s petition and ordered unconditional release of the patients’ entire files and directed a compliance date of August 24, 2000.

On August 18, 2000, Dr. Rademan filed his application for a writ of mandate or prohibition directing respondent superior court to vacate its order granting the Board’s petition to enforce its investigatory subpoena. We issued an alternative writ to stay the proceedings to consider the merits of Dr. Rademan’s petition.

In his petition Dr. Rademan argued Business and Professions Code section 2225 applies only to the physician-patient privilege and is not an exception to the psychotherapist-patient privilege. He also argued the trial court's order violates the psychotherapist-patient privilege and also violates the patients' constitutional right to privacy. The Board countered it was merely seeking to investigate the medical aspects of those patients' records to determine whether the prescriptions Dr. Rademan wrote—in his capacity as a physician—were unlawful.

Prior to oral argument we directed the parties to provide supplemental briefing on the issue whether certain factual allegations in the pharmacists' declarations provided good cause to believe the crime exception to the psychotherapist-patient privilege applied in this case. This court also requested briefing on the issue in the event the factual allegations were not themselves sufficient to eliminate the privilege, whether the privilege would be lost if a court's in camera review of the patients' medical records suggested the pharmacists' allegations had merit.

The Board takes the position the declarations provide prima facie evidence Dr. Rademan's services enabled or aided a crime and thus the crime/tort exception to the psychotherapist-patient privilege applies. The Board also argues in camera review of the medical records would be appropriate if necessary to corroborate or substantiate the pharmacists' allegations of criminal conduct.

Dr. Rademan suggests several reasons why either the crime/tort exception is inapplicable to this case or why in camera review of materials subject to a claim of privilege is unauthorized and inappropriate under California law.

We now review the merits of those arguments.

## DISCUSSION

### I. CALIFORNIA’S CRIME/TORT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE APPLIES TO EITHER CRIMES COMMITTED BY THE PSYCHOTHERAPIST, PATIENT OR BOTH.

Evidence Code section 1010 defines a psychotherapist as “[a] person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry.”<sup>1</sup> A “patient” in this context is defined as “a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition . . . .”<sup>2</sup>

The psychotherapist-patient privilege is found in Evidence Code section 1014. This section provides, that subject to waiver and other specified statutory exceptions, “the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . .”

Over the years courts have construed the privilege liberally in favor of patient confidentiality.<sup>3</sup> The Comment of the Senate Committee on Judiciary

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<sup>1</sup> Evid. Code, § 1010, subd. (a).

<sup>2</sup> Evid. Code, § 1011.

<sup>3</sup> See, e.g., *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 337.

explains the nature of the privilege embodied in Evidence Code section 1014: “A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient’s life. . . . Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends.

“The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected. . . .”

Normally the person asserting the privilege has the burden of proving the existence of the confidential relationship.<sup>4</sup> In this case, however, the Board

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<sup>4</sup> See, e.g., *People v. Cabral* (1993) 12 Cal.App.4th 820, 826-827 [defendant’s purpose in writing to psychologist in charge of sex offender program was to avoid state prison and not for the purpose of treatment; thus no privilege attached to the letter he sent the doctor]; *Mahoney v. Superior Court* (1983) 142 Cal.App.3d 937, 940-941 [general objection asserting psychotherapist-patient privilege without supporting details concerning nature of treatment or identity of psychotherapist was insufficient to invoke the privilege and presumption of confidentiality]; see also 2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 86, pp. 338-339 [the person opposing the privilege only has the burden of proving the privilege does not exist once the person claiming the privilege proves the preliminary fact a privilege exists].

assumes information transmitted between Dr. Rademan and his patients was “in the course of [the psychotherapeutic] relationship and in confidence by a means which, so far as the [patients were] aware, disclose[d] the information” to no outside persons.<sup>5</sup> Accordingly, under Evidence Code section 917 communications between Dr. Rademan and his patients were “presumed to have been made in confidence.” Thus, the Board, as the opponent of the claim of privilege, has the burden to prove the privilege is unavailable.<sup>6</sup>

The Board asserts the crime/tort exception applies to eliminate the psychotherapist-patient privilege under the facts of this case. The Board points out Health and Safety Code section 11153 makes it a crime to prescribe controlled substances to an addict outside an authorized narcotic treatment program or authorized institution. This section also makes it a crime to prescribe controlled substances outside a course of treatment and without a legitimate medical

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<sup>5</sup> Evid. Code, § 1012 [defining confidential communication between patient and psychotherapist].

<sup>6</sup> Evidence Code section 917 provides: “Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.”

purpose.<sup>7</sup> The Legislature specified violations of Health and Safety Code section 11153 are crimes, punished as either a felony or a misdemeanor.<sup>8</sup>

Under this section physicians are subject to prosecution for prescribing controlled substances to addicts (or to undercover agents posing as addicts) without any legitimate medical purpose or appropriate medical examinations.<sup>9</sup>

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<sup>7</sup> Health and Safety Code section 11153, subdivision (a) provides: “A prescription for a controlled substance shall only be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. Except as authorized by this division, the following are not legal prescriptions: (1) an order purporting to be a prescription which is issued not in the usual course of professional treatment or in legitimate and authorized research; or (2) an order for an addict or habitual user of controlled substances, which is issued not in the course of professional treatment or as part of an authorized narcotic treatment program, for the purpose of providing the user with controlled substances, sufficient to keep him or her comfortable by maintaining customary use.”

<sup>8</sup> Health and Safety Code section 11153, subdivision (b) provides: “Any person who knowingly violates this section shall be punished by imprisonment in the state prison or in the county jail not exceeding one year, or by a fine not exceeding twenty thousand dollars (\$20,000), or by both a fine and imprisonment.”

<sup>9</sup> See, e.g., *People v. Braddock* (1953) 41 Cal.2d 794, 801 [affirming conviction of physician who wrote a prescription for a narcotic for a person believed to be an addict “not under treatment for a pathology”]; *People v. Lonergan* (1990) 219 Cal.App.3d 82 [conviction affirmed for physician who knowingly wrote prescriptions for controlled substances for a patient and undercover agents who were not under treatment for a pathology other than addiction]; *People v. Anderson* (1972) 29 Cal.App.3d 551 [prescribing methadone to ambulatory narcotics addicts was neither done in “the course of professional treatment” nor in an approved setting for administering controlled substances to addicts].

Based on this provision the Board claims the pharmacists' declarations alone demonstrate the crime exception to the privilege applies.

The crime/tort exception to the psychotherapist-patient privilege appears in Evidence Code section 1018. This section provides in part, "[t]here is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime . . . ."

Dr. Rademan argues this statutory language focuses on the *patient's* motive for seeking the psychotherapist's services and thus the only permissible interpretation is the crime/tort exception only applies where the *patient's purpose* is to use the doctor's services to commit a crime, regardless of the doctor's acts or involvement in the same criminal activity. Accordingly, Dr. Rademan argues the crime exception to the privilege cannot be applied in this case due to the absence of any evidence his patients had a criminal purpose in seeking his services.

There are no reported California decisions interpreting the crime/tort exception to the psychotherapist-patient privilege. However, we note the statutory crime/fraud exception to the attorney-client privilege contains identical language as the crime/tort exception to the psychotherapist-patient privilege. Evidence Code section 956 provides: "There is no privilege under this article if the *services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit* a crime or a fraud."<sup>10</sup> Because of the similarity of language between the two statutory provisions, decisions interpreting the attorney-client crime/fraud exception are useful to an analysis whether the patient's motivation should control in determining whether the crime/tort exception to the psychotherapist-patient privilege applies.

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<sup>10</sup> Compare similar language in Evidence Code, section 1018: " . . . There is no privilege under this article if the *services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit* a crime or a tort or to escape detection or apprehension after the commission of a crime or tort."

Notably, an identical argument has been raised in the attorney-client context and rejected by the court in *People v. Superior Court (Bauman & Rose)*.<sup>11</sup> In that case several attorneys were suspected of insurance fraud. Client files were seized from their law office pursuant to a warrant. The attorneys requested the records be sealed until the trial court could conduct an in camera hearing to determine whether the attorney-client privilege applied to the seized documents.<sup>12</sup> The appellate court rejected the People's contention the finding of probable cause by the magistrate issuing the warrant was sufficient to apply the crime-tort exception to all the seized documents and thus in camera review was unnecessary.<sup>13</sup> On the other hand, the appellate court also rejected the attorneys' suggestion the crime/fraud exception to the privilege applies only when the client is the party engaged in the criminal activity and is inapplicable when it is the lawyer who instigates the crime in which the client, knowingly or otherwise, joins. The *Bauman & Rose* court expressly "reject[ed] this interpretation of that exception. Where the entire attorney-client relationship is embarked upon in furtherance of criminal activity, and the relationship is permeated by criminal activity and the client takes an active part in it, the crime/fraud exception is

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<sup>11</sup> (1995) 37 Cal.App.4th 1757.

<sup>12</sup> *Id.* at p. 1762.

<sup>13</sup> *Id.* at p. 1768. The court noted, "the probable cause showing to obtain a search warrant does not satisfy the showing required to establish the crime-fraud exception to the attorney-client privilege. Furthermore, . . . there is always the possibility that either by mistake or misunderstandings items may be seized which are outside of the scope of the warrant. For both reasons, a judge, rather than the officer executing the warrant, should determine the applicability of the privilege." (*Id.* at p. 1769.)

satisfied, notwithstanding that it may have been the attorney who originally conscripted the client for the illegal purpose. . . .”<sup>14</sup>

This interpretation applying the exception to either party’s conduct is consistent with early decisions on which the attorney-client crime/fraud exception is based.<sup>15</sup> For example, in *Abbott v. Superior Court*<sup>16</sup> an attorney engaged in an elaborate conspiracy to procure an illegal abortion for a client. The attorney claimed the communication evidencing the conspiracy was a privileged communication. The appellate court disagreed. “This evidence, if believed, is sufficient to establish that petitioner was an active member of the conspiracy to violate the law prohibiting abortions and was counseling a fellow member of the conspiracy in an attempt to further its illegal purposes. Under the law as settled in every common law jurisdiction whose courts have considered the question this

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<sup>14</sup> *Id.* at p. 1768, fn. 4. The Third Circuit has also expressly rejected a similar argument regarding the federal crime/fraud exception to the attorney-client privilege adopted in *United v. Zolin* (1989) 491 U.S. 554. In *In re Impounded Case (Law Firm)* (3d Cir. 1989) 879 F.2d 1211 lawyers under investigation for federal crimes claimed the crime/fraud exception to the attorney-client privilege did not apply to defeat the client’s privilege because the alleged criminality was solely that of the law firm. The court disagreed, explaining “[i]t is not apparent to us what interest is truly served by permitting an attorney to prevent this type of investigation of his own alleged criminal conduct by asserting an innocent client’s privilege with respect to documents tending to show criminal activity by the lawyer. On the contrary, the values implicated, particularly the search for the truth, weigh heavily in favor of denying the privilege in these circumstances. . . .” (*Id.* at pp. 1213-1214.)

<sup>15</sup> The California Law Revision Commission relied on the decision in *Abbott v. Superior Court* (1947) 78 Cal.App.2d 19, 21 to support its comment Evidence Code section 956 stated existing law. See discussion in *People v. Clark* (1990) 50 Cal.3d 583, 622.

<sup>16</sup> *Supra*, 78 Cal.App.2d 19.

evidence was not within the attorney-client privilege”<sup>17</sup> The court also noted the attorney could not claim the privilege for his own self-protection. “The privilege, where it exists, is the client’s, not the attorney’s, and if it results in the protection of the attorney it does so only accidentally as a result of the assertion of the client’s right. Here the client’s privilege does not exist and the attorney is in no position to assert a privilege on his own behalf.”<sup>18</sup>

Similarly, in the context of the confidential marital communications privilege, the crime/fraud exception operates to eliminate the privilege whenever either spouse’s communication enables or aids anyone to commit a crime or fraud.<sup>19</sup> Thus, in *People v. Von Villas*<sup>20</sup> the defendant could not validly assert the confidential marital communications privilege to exclude statements he made directing his wife to destroy personal letters from him and stating he too would get rid of some other piece of evidence. We concluded the trial court had not erred in finding the crime/fraud exception applicable as the defendant’s statements amounted to efforts to obstruct justice. Also in *People v. Pierce*<sup>21</sup> our Supreme Court found a husband and wife who conspired between themselves to commit grand theft and other crimes, could not claim immunity from prosecution on the basis of their marital status. The *Pierce* court reasoned, “[s]pousehood may afford

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<sup>17</sup> *Id.* at p. 21.

<sup>18</sup> *Ibid.*

<sup>19</sup> Evidence Code section 981 is the crime/fraud exception to the confidential marital communication privilege. This section provides: “There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud.”

<sup>20</sup> (1992) 11 Cal.App.4th 175, 222-223.

<sup>21</sup> (1964) 61 Cal.2d 879.

a cover for criminal conspiracy. It should not also afford automatically a blanket of immunity from criminal responsibility.”<sup>22</sup>

In sum, we find these decisions interpreting virtually identical statutory language in analogous crime/fraud exceptions to be persuasive. We accordingly conclude the crime/tort exception to the psychotherapist-patient privilege is applicable when the alleged criminal acts are those of the psychotherapist, the patient, or both.

II. AN INTERPRETATION WHICH APPLIES THE EXCEPTION BASED ON EITHER THE PSYCHOTHERAPIST’S OR PATIENT’S ACTS IS CONSISTENT WITH FEDERAL COMMON LAW APPLYING A CRIME/FRAUD EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

When the United States Supreme Court promulgated rules of evidence, culminating in 1975 with the statutory adoption of the Federal Rules of Evidence, the Court also proposed rules to govern the federal law of privilege. While retaining most of the other proposed rules of evidence with some modifications, Congress deleted the proposed rules pertaining to privilege. Instead Congress adopted a single rule addressing privilege.<sup>23</sup> Rule 501 provides in essence that unless otherwise required, privileges “shall be governed by the principles of the common law,” or in an action where state law provides the rule of decision, the privilege “shall be determined in accordance with State law.”<sup>24</sup>

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<sup>22</sup> *Id.* at p. 881.

<sup>23</sup> See generally Developments in the Law—Privileged Communications (1985) 98 Harv. L. Rev. 1454, 1463-1470 [summarizing history of adoption of federal rule].

<sup>24</sup> Fed. Rule Evid., § 501.

Thus, early federal decisions are inconsistent both in recognizing a psychotherapist-patient privilege, and in acknowledging a crime/fraud/tort exception to the privilege.<sup>25</sup> Several federal circuit courts avoided the recognition issue by instead holding even if the privilege was available under federal common law it was not applicable in the circumstances presented.<sup>26</sup>

Nevertheless, several earlier federal decisions invoke the equivalent of the crime/fraud exception when necessary to review a psychotherapist's records for alleged criminal activity of the psychotherapist. For example, in *In re Grand Jury Subpoena (Psychological Treatment Records)*<sup>27</sup> a psychologist was under investigation for insurance and billing fraud. A federal grand jury subpoenaed his and his corporation's patients' billing and treatment records. The doctor asserted his clients' psychotherapist-patient privilege and moved to quash the subpoena.<sup>28</sup> After engaging in a lengthy analysis balancing the competing interests the court ultimately found the policy reasons to recognize the privilege prevailed.<sup>29</sup> It nevertheless concluded the privilege was inapplicable in the case under both the

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<sup>25</sup> See generally, Annot., Psychotherapist-Patient Privilege Under Federal Common Law (1985) 72 A.L.R. Fed. 395 and Annot., Privilege, In Judicial or Quasi-Judicial Proceedings, Arising From Relationship Between Psychiatrist or Psychologist and Patient (1972) 44 A.L.R. 24.

<sup>26</sup> See *In re Grand Jury Subpoena (Psychological Treatment Records)* (N.J. 1989) 710 F.Supp. 999, 1012 and cases collected; *In re Zuniga* (6th Cir. 1983) 714 F.2d 632, 638-639 and cases collected; see also, 1 McCormick on Evidence (5th ed. 1999) Privilege: Common law & Statutory § 104, p. 418 [The wide variation among state statutes creating and defining privileges makes it difficult to generalize usefully about their exceptions].

<sup>27</sup> *Supra*, 710 F.Supp. 999.

<sup>28</sup> *Id.* at p. 1003.

<sup>29</sup> *Id.* at p. 1012.

patient-litigant exception and crime/fraud exception. With regard to the crime exception, the court reasoned, “[i]n a situation where the psychotherapist-patient relationship itself is potentially criminal in nature, this court believes that the privilege must give way to the federal government’s interest in probing the true nature of the relationship. We operate under the potentially naïve assumption that most psychotherapy patients engage in such therapy for reasons related to mental health and emotional well-being, not an interest in facilitating crime. The absence of the privilege when the psychotherapeutic relationship may be criminal will have, we believe, no adverse effect on society’s interest in fostering psychotherapeutic treatment, or on the privacy interests of most psychotherapy patients. Without the subpoenaed records, there may be no way for the grand jury to adequately assess whether a crime was probably committed here—for this is the only information available providing a true insight into the relationship and activities of the [patient] and the psychologist with respect to the accident claim. A privilege would in these circumstances, shield potentially criminal activity.”<sup>30</sup>

In *In re Doe*<sup>31</sup> the Court of Appeals was faced with a similar situation. In *Doe*, a psychiatrist who saw 70 patients a day and prescribed Quaaludes for over 90 percent of his patients, attempted to resist a grand jury subpoena duces tecum by asserting a psychotherapist-patient privilege. While the court did not doubt the patients’ interest in keeping the relationship confidential, it disagreed the privilege should be recognized on the facts of the case. In so ruling, the court noted there was little, if any, evidence any genuine therapy took place.<sup>32</sup>

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<sup>30</sup> *Id.* at p. 1014.\

<sup>31</sup> (2d Cir. 1983) 711 F.2d 1187.

<sup>32</sup> *Id.* at p. 1193.

In 1996 the United States Supreme Court in *Jaffee v. Redmond*<sup>33</sup> finally recognized a psychotherapist-patient privilege in federal common law. However, the Court did not define the parameters of the privilege and left the refinement of the common law definition for the federal courts to make on a case-by-case basis.<sup>34</sup>

It was not until 1999 a circuit court expressly recognized and applied a federal common law crime/fraud exception to the psychotherapist-patient privilege.<sup>35</sup> In *In re Grand Jury Proceedings (Gregory P. Violette)*<sup>36</sup> the United States subpoenaed two psychiatrists to appear before the grand jury investigating Violette, one of their patients, for bank fraud and possible other crimes.<sup>37</sup> The doctors appeared and invoked the psychotherapist-patient privilege on Violette's behalf.<sup>38</sup>

The First Circuit noted the *Jaffee* Court justified the psychotherapist-patient privilege by analogizing to the established attorney-client privilege. "As the Supreme Court has framed the issues, the parallels are striking. The attorney-client privilege and the psychotherapist-patient privilege both exist to foster the

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<sup>33</sup> (1996) 518 U.S. 1.

<sup>34</sup> *Id.* at p. 18 ["it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'" (Quoting, *Upjohn Co. v. United States* (1981) 449 U.S. 383, 386)].

<sup>35</sup> See Hollander, 3 Wharton's Criminal Evidence (15th ed. 1999) Privileges, § 11:52, p. 207.

<sup>36</sup> (1st Cir. 1999) 183 F.3d 71.

<sup>37</sup> *Id.* at pp. 72-73.

<sup>38</sup> *Id.* at p. 73.

confidence and trust required for effective counseling relationships (legal and psychiatric respectively). The private interests served by these relationships, however, do not justify a privilege. Rather, we customarily respect the confidentiality of communications made in the course of these relationships because, on balance, doing so serves the public weal. The attorney-client privilege promotes ‘the observance of law and administration of justice,’ [citation], just as the psychotherapist-patient privilege promotes ‘[t]he mental health of our citizenry,’ *Jaffee*, 518 U.S. at 11, . . .”<sup>39</sup>

The court thus concluded this sense of parity should carry over to the crime-fraud exception. “First, it is difficult to conjure up a case in which both mental health and criminal or fraudulent purposes might simultaneously be advanced. In our view, communications that are intended to further a crime or fraud will rarely, if ever, be allied with bona fide psychotherapy and, thus, protecting such communications will not promote mental health.”<sup>40</sup> In addition, the court noted how the psychotherapist-patient privilege could potentially be abused to shield a psychotherapist’s criminal or fraudulent acts in the absence of a crime-fraud exception.<sup>41</sup>

In applying this newly adopted exception, the court concluded the evidence demonstrating Violette had obtained assistance from the two psychiatrists to

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<sup>39</sup> *Id.* at p. 76.

<sup>40</sup> *Id.* at p. 77.

<sup>41</sup> Noting the factual circumstances of *In re Zuniga*, *supra*, 714 F.2d 632, 634 [health insurance fraud]; *In re Pebsworth* (7th Cir. 1983) 705 F.2d 261, 262 [same]; and *In re Grand Jury Subpoena (Psychological Treatment Records)*, *supra*, 710 F.Supp. at p. 1014. [same].

defraud lenders and/or disability insurers adequate to invoke the crime/fraud exception.<sup>42</sup>

As the foregoing decisions illustrate, under federal common law the crime/fraud exception to the psychotherapist-patient privilege has also been applied to prevent the privilege from shielding a psychotherapist's own criminal or fraudulent acts. It is thus consistent with the interpretation we apply today to California's statutory crime/tort exception to the psychotherapist-patient privilege.<sup>43</sup>

III. THE PHARMACISTS' DECLARATIONS PROVIDE PRIMA FACIE EVIDENCE OF A CRIME SUFFICIENT TO JUSTIFY IN CAMERA REVIEW OF THE PATIENT RECORDS BY THE TRIAL COURT.

Evidence Code section 915, subdivision (a) states the general rule that disclosure of information claimed to be privileged may not be compelled in order to rule on a claim of privilege.<sup>44</sup> Based on this language, Dr. Rademan argues even an in camera review of the patients' records by the trial court would violate this provision.

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<sup>42</sup> But see, Note, Evidence—Evidentiary Privilege—First Circuit Recognizes Crime-Fraud Exception To Psychotherapist-Patient Privilege.—*In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71 (1st Cir. 1999). (2000) 113 Harv. L. Rev. 1539 [criticizing decision for its alleged failure to weigh the privacy interests of psychotherapy patients against the costs to society and justice from the loss of probative evidence].

<sup>43</sup> Evid. Code, § 1018.

<sup>44</sup> Evidence Code section 915, subdivision (a) provides in pertinent part: "Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege . . . ."

Subdivision (b) authorizes in camera review of allegedly privileged materials in the event the trial court is unable to rule on a claim of privilege, regarding official information, the identity of an informer, materials seized pursuant to a warrant under Penal Code section 1524 or trade secrets, without requiring disclosure of the information claimed to be privileged.<sup>45</sup> In camera review under Evidence Code section 915, subdivision (b) is permissive and the decision whether to hold a hearing is within the trial court's sound discretion.<sup>46</sup>

Despite the apparent statutory restriction in Evidence Code section 915, subdivision (a), and the narrow exceptions listed in subdivision (b), there is authority to the effect in camera review of allegedly privilege material is permitted in any number of situations, outside the statutorily enumerated situations, and outside the search warrant procedure of Penal Code section 1524.<sup>47</sup>

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<sup>45</sup> Evidence Code section 915, subdivision (b) provides: "When a court is ruling on a claim of privilege [of official information, identity of an informer, trade secret, or of documents seized pursuant to a search warrant] and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers."

<sup>46</sup> *In re Muszalski* (1975) 52 Cal.App.3d 475, 482; see also 7 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 91, p. 343.

<sup>47</sup> See, e.g., *People v. Hammon* (1997) 15 Cal.4th 1117, 1128 [trial court was not required at the pretrial stage of the proceedings to review in camera or grant discovery of privileged records of psychotherapists who had treated the victim]; *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1619 [in camera review of allegedly privileged insurance information ordered in action by attorney against his professional liability insurer]; *Ekeh v. Hartford Fire Ins. Co.* (N.D.Cal. 1999)

In addition, in camera review of psychiatric patients' records has been authorized where the applicability of an exception depends on the content of the allegedly privileged communications. For example, in *In re Lifschutz*<sup>48</sup> a psychiatrist was imprisoned for contempt for refusing to obey a court order instructing him to answer deposition questions and produce confidential records in a civil action. In the civil action a former patient sought damages for physical injuries, pain and suffering, as well as for mental and emotional distress.<sup>49</sup> The doctor had refused to respond, claiming the psychotherapist-patient privilege was absolute. The Supreme Court disagreed there was any constitutional basis for asserting an absolute privilege<sup>50</sup> and held the patient-litigant exception to the privilege applied.<sup>51</sup> In dictum the *Lifschutz* court commented, "[a]lthough ordinarily a patient cannot be required to disclose privileged information in order to claim the privilege (Evid. Code, § 915, subd. (a)), because the privileged status of psychotherapeutic communications under the patient-litigant exception depends upon the content of the communication, a patient may have to reveal some information about a communication to enable the trial judge to pass on his claim of irrelevancy. Upon such revelation, the trial judge should take necessary

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39 F.Supp.2d 1216, 1219 [crime/fraud exception to attorney/client privilege]; *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 645-649 [same]; *People v. Pack* (1987) 194 Cal.App.3d 1512, 1517 [a criminal defendant must make a showing of good cause to justify in camera review of a victim's psychotherapy records].

<sup>48</sup> (1970) 2 Cal.3d 415.

<sup>49</sup> *Id.* at pp. 420-421.

<sup>50</sup> *Id.* at p. 438.

<sup>51</sup> *Id.* at p. 431.

precautions to protect the confidentiality of these communications; for example, he might routinely permit such disclosure to be made ex parte in his chambers. (Compare the procedure suggested in Evid. Code, § 915, subd. (b).) (See also Developments in the Law—Discovery (1964) 74 Harv. L. Rev. 940, 1017-1018.)”<sup>52</sup>

Later the court in *Mavroudis v. Superior Court*<sup>53</sup> followed the *Lifschutz* analysis. The case was a civil action against therapists in which the victims of a patient’s assault alleged a failure to give appropriate *Tarasoff*<sup>54</sup> warnings. The *Mavroudis* court directed the trial court to review the psychiatric patient’s medical records in camera to determine whether the “dangerous patient” exception applied, i.e., whether the therapists determined or reasonably should have determined, the patient presented a serious danger of violence to a readily identifiable victim and disclosure of confidential communications was necessary to prevent the threatened danger.<sup>55</sup> In ordering in camera review, the *Mavroudis* court rejected the therapists’ argument compelled disclosure would violate Evidence Code section 915, subdivision (a). The court reasoned, “where an exception to a privilege depends upon the content of a communication, the court may require disclosure in camera in making its ruling.”<sup>56</sup>

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<sup>52</sup> *Id.* at p. 437, fn. 23.

<sup>53</sup> (1980) 102 Cal.App.3d 594.

<sup>54</sup> *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 [defining the duty of a psychotherapist to disclose confidential information to avert danger to others].

<sup>55</sup> *Mavroudis v. Superior Court, supra*, 102 Cal.App.3d at p. 604.

<sup>56</sup> *Id.* at p. 605.

As the foregoing illustrates, these decisions authorize disclosure in an in camera hearing where the applicability of an exception depends on the content of the allegedly privileged material. This is not, however, the same as saying in camera review is appropriate whenever an opponent of the privilege makes a general assertion an exception applies, or otherwise asserts the applicability of an exception without providing a factual basis for the assertion.<sup>57</sup> The party making the claim for the exception still has the burden of proving the exception applies.<sup>58</sup> This leads to the question of the threshold showing the opponent of the privilege must make in order to trigger in camera review.<sup>59</sup>

In the context of the attorney-client privilege, in order to establish the crime/fraud exception to the privilege the party must establish a “prima facie” case

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<sup>57</sup> See, e.g., *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 100 [mere assertion crime/fraud exception applied insufficient]; *Mahoney v. Superior Court, supra*, 142 Cal.App.3d at p. 940-941 [general objection of privilege insufficient].

<sup>58</sup> Evid. Code, § 917.

<sup>59</sup> A “good cause” standard is generally applied when the Board seeks to subpoena a physician’s medical records. In that context the Board must demonstrate through competent evidence the particular records it seeks are relevant and material to the Board’s inquiry sufficient for a trial court to independently make a finding of good cause to order the materials disclosed. (See, e.g., *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1149; [“The board’s showing must provide competent evidence that permits the trial court to make an independent finding of good cause.”]; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 681 [Board must make a showing of good cause before disclosure of a patient’s medical records is warranted].) This “good cause” standard has also applied in determining whether a criminal defendant has provided an adequate factual basis to warrant in camera review of a witness’s mental health records. (*People v. Pack, supra*, 194 Cal.App.3d 1512, 1517 [a “good cause” showing is a prerequisite to an in camera review of privileged documents].)

of a crime or fraud.<sup>60</sup> This showing is generally distinguished from a showing of probable cause sufficient for issuance of a search warrant.<sup>61</sup>

In federal law the standard of proof for in camera review of allegedly privileged attorney-client communications to determine whether the crime/fraud exception should apply is substantially similar to the prima facie standard of proof. In *United States v. Zolin*<sup>62</sup> the court determined a lesser evidentiary showing is sufficient to trigger in camera review than would be required to ultimately overcome the privilege.<sup>63</sup> The rule the Supreme Court fashioned is as follows: “Before engaging in in camera review to determine the applicability of the crime-fraud exception, ‘the judge should require a showing of a factual basis adequate to

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<sup>60</sup> See, e.g., *People v. Superior Court (Bauman & Rose)*, *supra*, 37 Cal.App.4th 1757, 1769 [to establish the crime/fraud exception to the attorney-client privilege, the party opposing the privilege must establish a prima facie case of fraud. The party must also establish a reasonable relationship between the fraud and the attorney-client communication]; *Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 174-175 [rejecting contention showing of probable cause for warrant was sufficient to establish a prima facie showing the crime/fraud exception to the attorney-client privilege applied]; *Dickerson v. Superior Court*, *supra*, 135 Cal.App.3d 93, 100 [had a prima facie showing of fraudulent purpose been made the discovery order would have been proper based on the crime/fraud exception to the attorney client privilege]; *State Farm Fire & Cas. Co. v. Superior Court*, *supra*, 54 Cal.App.4th 625, 643 [to invoke the crime/fraud exception to the attorney-client privilege requires a prima facie showing]; *Nowell v. Superior Court* (1963) 223 Cal.App.2d 652, 657 [evidence should be presented to make a prima facie showing the purpose of the attorney-client communication was to enable or aid a crime]; *Abbott v. Superior Court*, *supra*, 78 Cal.App.2d 19, 21 [for the crime/fraud exception to the attorney-client privilege to apply there must be a prima facie showing of criminal activities].

<sup>61</sup> See discussion in *People v. Superior Court (Bauman & Rose)*, *supra*, 37 Cal.App.4th at p. 1769.

<sup>62</sup> *Supra*, 491 U.S. 554.

<sup>63</sup> *Id.* at p. 572.

support a good faith belief by a reasonable person,' [citation], that in camera review of the material may reveal evidence to establish the claim that the crime-fraud exception applies.”<sup>64</sup>

At least one commentator suggests an even lower threshold of proof before in camera review is warranted. “No matter how light the burden of proof which confronts the party claiming the exception, there are many blatant abuses of privilege which cannot be substantiated by extrinsic evidence. This is particularly true, it would seem, of the marital privilege and all other situations in which an alleged illegal proposal is made in the context of a relationship which has an apparent legitimate end. The number of such instances has produced strong pressure for some examination of the communication by the judge, and authority for such examination exists, at least as to the professional privileges, in some jurisdictions. Whether the communications are confidential and within the prescribed professional relationship is examined by permitting or directing at least limited inquiry into the purpose and circumstances of the transaction.”<sup>65</sup>

We agree the difficulties of establishing a prima facie case through extrinsic evidence militate in favor of imposing a relatively light burden of proof. Thus, the showing justifying in camera review should only require some objectively reasonable, factual basis amounting to a prima facie case demonstrating the exception applies.<sup>66</sup>

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<sup>64</sup> *Ibid.*

<sup>65</sup> Note, The Future Crime or Tort Exception to Communications Privileges (1964) 77 Harv. R. Rev. 730, 737.

<sup>66</sup> But see discussion in Poulin, The Psychotherapist-Patient Privilege After *Jaffee v. Redmond*: Where Do We Go From Here? (1998) 76 Wash. U. L. Quarterly 1341, 1405-1407 [arguing trial courts should not resort to in camera review unless information essential to the ruling can be found only in the allegedly

As applied to the present case, the extrinsic evidence of criminal activity concerning patient W.N. is more than sufficient to trigger in camera review. The pharmacists' declarations the Board presented demonstrate Dr. Rademan's acts in writing W.N. prescriptions for controlled substances likely constitute violations of Health and Safety Code section 11153. According to pharmacist Lalich's declaration Dr. Rademan wrote W.N. prescriptions for controlled substances although he was a self-described addict. Ms. Lalich stated she directly informed Dr. Rademan W.N. told her he was an addict and that Dr. Rademan's response was to fill the prescription anyway. These factual allegations suggest Dr. Rademan willingly supplied controlled substances to a known addict outside a legislatively authorized setting. If these allegations are substantiated, they would demonstrate Dr. Rademan committed or enabled a crime by violating Health and Safety Code section 11153.

The Board's allegations involving patient D.B. less clearly implicate the crime exception but nevertheless state a prima facie case sufficient to trigger in camera review. The pharmacists' declarations suggest Dr. Rademan prescribed D.B. unusually large amounts of whatever medications D.B. wanted. If Dr. Rademan prescribed controlled substances for D.B. (or W.N. for that matter) without a legitimate medical purpose and good faith medical examination, then his acts of prescribing those medications would similarly constitute a violation of Health and Safety Code section 11153. However, in D.B.'s case, review of the medical records is necessary to determine whether the crime exception is applicable, that is to say, whether the records demonstrate Dr. Rademan in fact had a medically justifiable basis for prescribing the types and quantities of drugs he did for this patient.

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privileged records and the party seeking access makes an initial showing an exception applies].

Dr. Rademan argues in camera review is inappropriate, claiming the trial court lacks the expertise to review medical files. He argues the trial court cannot make the decision whether the exception should apply in the absence of independent medical testimony or evidence on the standard in the industry for prescribing the challenged medications.

First, we note the determination of preliminary facts, including the existence of a privilege, is for the trial court in the first instance.<sup>67</sup> In some cases the trial court may well require expert assistance.<sup>68</sup> But in many situations the trial court is competent to make such a determination without expert testimony.<sup>69</sup> This case provides such an example. Here patient W.N. admitted to the pharmacist he was a drug addict. If in camera review of W.N.'s records substantiate the Board's claim Dr. Rademan knowingly supplied controlled substances to an acknowledged drug addict, the trial court can then simply refer to the applicable sections of the Health and Safety Code and Business and Professions Code to determine whether the crime exception to the privilege applies.<sup>70</sup>

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<sup>67</sup> Evid. Code, § 405; *Holm v. Superior Court* (1954) 42 Cal.2d 500, 507 ["In any given situation it is necessary that a determination be made concerning the facts asserted as a basis for the privilege. This determination is for the trial court in the first instance."].

<sup>68</sup> *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 451; *Mavroudis v. Superior Court*, *supra*, 102 Cal.App.3d at pp. 604-605.

<sup>69</sup> *Mavroudis v. Superior Court*, *supra*, 102 Cal.App.3d at p. 605; *Menendez v. Superior Court*, *supra*, 3 Cal.4th 435, 451 ["In certain cases, expert testimony as to the relevant standards may be necessary. Here, it was not: the evidence all but compelled the conclusion" the dangerous patient exception applied.].

<sup>70</sup> In addition to the provisions in Health and Safety Code section 11153, Health and Safety Code section 11200 states prescriptions for some controlled substances may not be refilled in amounts which exceed a 120-day supply.

The trial court should initially examine the records in camera to determine if the material substantiates the Board's allegations of prescribing to a drug addict. If they do, then the court is competent to rule as a matter of law the exception applies to those portions of the patients' records. Conversely, if such review negates such a finding, then the crime/tort exception is inapplicable, and the patients' records are not subject to discovery.

On the other hand, after its initial review the trial court may determine expert medical testimony regarding the applicable standard of care is in fact required. In this event, the trial court should appoint its own expert, and receive the expert's testimony in an in camera proceeding.<sup>71</sup>

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(Health & Saf. Code, § 11200, subd. (b).) Prescriptions for schedule II controlled substances, such as Hydrocodone, may not be refilled. (Health & Saf. Code, §§ 11200, subd. (c); 11055.) In addition, controlled substances may only be prescribed "when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, *other than addiction to a controlled substance*." (Health & Saf. Code, § 11210, italics added.) Moreover, controlled substances may only be prescribed when in "good faith" the physician "believes the disease, ailment, injury, or infirmity requires the treatment" and then only in quantities and for periods of time as are reasonably necessary. (*Ibid.*)

The Legislature has designated special treatment for drug addicts. A physician or surgeon may provide an addict with controlled substances, (Health & Saf. Code, § 11215, subd. (a)(1)), but only in designated settings as specified by the Legislature, such as approved mental health institutions, prisons, jails, hospitals, state licensed drug and alcohol treatment programs, and other controlled environments. (Health & Saf. Code, § 11217.)

The "Intractable Pain Treatment Act" specifies controlled substances should not be provided unless the attending physician and/or specialist agree all generally accepted medical practices or treatments have failed to alleviate the pain and the person in fact has a diagnosed condition causing intractable pain. (Bus. & Prof. Code, § 2241.5, subds. (a), (b).)

<sup>71</sup> Evidence Code section 730 authorizes a trial court to appoint an expert whenever "expert evidence is or may be required by the court." See also, *Mavroudis v. Superior Court*, *supra*, 102 Cal.App.3d at pp. 605-606 [to preserve

In determining what portions of the medical records, if any, should be released to the Board, the trial court should be mindful of the patients' privacy rights and legitimate expectations of confidentiality.<sup>72</sup> In speaking of a physician's patients' records, the *Wood v. Superior Court*<sup>73</sup> court noted, "[t]he information that may be recorded in a doctor's files is broadranging. The chronology of ailments and treatment is potentially sensitive. Patients may disclose highly personal details of lifestyle and information concerning sources of stress and anxiety. These are matters of great sensitivity going to the core of the concerns for the privacy of information about an individual. The intrusion upon personal privacy when a state agency examines such records is substantial."<sup>74</sup>

Accordingly, unrestricted production of the patients' files as the trial court ordered implicates the patients' privacy rights and is likely unwarranted in this case in any event. The trial court should review the patients' files in camera to determine whether they contain information which corroborates the Board's allegations of criminal violations of Health and Safety Code section 11153. If they do, those portions of the records may be released to the Board as excepted from the psychotherapist-patient privilege. That is to say, those portions of the records which reflect the patients' thoughts, feelings and impressions, or the substance of the psychotherapeutic dialogue need not be released, unless the trial court finds any such statements fit squarely within the crime/tort exception.

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the confidentiality of the records, the court should appoint its own expert where expert testimony is required].

<sup>72</sup> Cal. Const. art. I, § 1; *White v. Davis* (1975) 13 Cal.3d 757 [exploring California's then newly enacted constitutional right to privacy].

<sup>73</sup> *Supra*, 166 Cal.App.3d 1138.

<sup>74</sup> *Id.* at p. 1147.

Similarly, those portions of the records possibly exposing personal relationships which are of no concern to the Board's legitimate investigation should also remain unavailable.

#### DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its order directing petitioner to turn over the entirety of patients D.B.'s and W.N.'s records. The superior court is ordered to conduct an in camera review of those patient files in accordance with Evidence Code section 915 and to reconsider the Board's motion in accordance with the views expressed in this opinion. The alternative writ is discharged. Each party to bear its own costs of appeal.

#### CERTIFIED FOR PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

NEAL, J.